ORIGINAL

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FILED
08 JUN 12 PM 12: 11
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: cp DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FIRST STATE INSURANCE COMPANY, a Connecticut corporation,

Plaintiff,

v.

SAN DIEGO UNIFIED PORT DISTRICT, a public agency,

Defendant.

Case No. '08 CV 1046 L RBB

COMPLAINT FOR DECLARATORY JUDGMENT

CR

Plaintiff First State Insurance Company ("First State"), for its Complaint against Defendant San Diego Unified Port District ("Port of San Diego"), states and alleges as follows:

NATURE OF THE ACTION

1. This is an action for declaratory relief pursuant to 28 U.S.C. Section 2201 relating to two Special Public Entity Difference in Condition Comprehensive Insurance Policies issued by First State to Port of San Diego (the "First State DIC Policies"). As set forth more fully below, First State seeks a judgment declaring that First State owes no obligation under the First State DIC Policies to defend Port of San Diego in two pending administrative proceedings before the California Regional Water Quality Control Board for the San Diego Region ("CRWQCB") relating to the alleged contamination of the Southwest Marine Shipyard and the National Steel and Shipbuilding Company Shipyard, or to pay any defense or indemnity costs related thereto.

THE PARTIES

2. Plaintiff First State is a corporation organized and existing under the laws of the State of Connecticut with its principal place of business in the Commonwealth of Massachusetts.

3. Port of San Diego is a special governmental entity created pursuant to California Harbor & Navigations Code ("H&N Code") Appendix 1, § 1, *et seq.* Port of San Diego's headquarters are located in the City and County of San Diego, California.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 (a)(1), because plaintiff and defendant are citizens of different States and the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. An actual, justiciable controversy exists between the parties relating to their respective legal rights and duties warranting declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure.

5. This Court has personal jurisdiction over Port of San Diego because Port of San Diego is a governmental agency operating in this district and has consented to jurisdiction in this Court. H&N Code App. 1 § 23.

6. Venue is proper in this district under 28 U.S.C. § 1391(a)(1), because it is the district where Port of San Diego resides.

FACTUAL ALLEGATIONS

A. THE INVESTIGATIONS AND ADMINISTRATIVE PROCEEDINGS

7. Defendant Port of San Diego is a public agency responsible for developing the San Diego harbor and enhancing its tidelands. H&N Code App. 1 § 4. Port of San Diego holds and manages certain sites as a Trustee on behalf of the People of California. H&N Code App. 1 §§ 5, 5.5. It possesses authority to protect, preserve, and enhance the natural resources and water quality of the San Diego Bay. H&N Code App. 1 §§ 4-5.

8. Under the Porter-Cologne Water Quality Control Act, CRWQCB has the authority to investigate the quality of state waters in the San Diego region and to institute administrative proceedings in connection with violations of certain water quality provisions where appropriate. On February 19, 2004, the CRWQCB initiated such an investigation by issuing Investigation Order Nos. R9-2004-0026 ("Order No. 0026") and R9-2004-0027 ("Order No. 0027") to, *inter alia*, the Port of San Diego.

9. In Order No. 0026, CRWQCB alleged that it found elevated levels of contaminants at the Southwest Marine Shipyard located at 2205 East Belt in San Diego, California (the "Southwest Marine Site"). CRWQCB further alleged that Port of San Diego owns the tidelands and the submerged lands at the Southwest Marine Site, controls decisions regarding what type of facilities occupy lands adjacent to the San Diego Bay, and had the authority and ability to impose controls that could have prevented or reduced the discharge of pollutants from the Southwest Marine Site into the San Diego Bay. CRWQCB ordered Port of San Diego to conduct studies and produce a technical report regarding the contamination and abatement of the Southwest Marine Site. Under the order, Port of San

Diego was required to show cause why it should not be identified as a person responsible in the Cleanup and Abatement Order to be issued by CRWQCB

10. In Order No. 0027, the CRWQCB alleged that it found elevated levels of hazardous pollutants at the National Steel and Shipbuilding Company Shipyard located at Harbor Drive and 28th Street in San Diego, California (the "NASSCO Site"). CRWQCB further alleged that the Port of San Diego owns the tidelands and the submerged lands at the NASSCO Site, controls decisions regarding what type of facilities occupy lands adjacent to the San Diego Bay, and had the authority and ability to impose controls that could have prevented or reduced the discharge of pollutants from the NASSCO Site into the San Diego Bay. CRWQCB ordered Port of San Diego to conduct studies and produce a technical report regarding the contamination and abatement of the NASSCO Site. Under the order, Port of San Diego was required to show cause why it should not be identified as a person responsible in the Cleanup and Abatement Order to be issued by CRWQCB.

11. On June 29, 2005, CRWQCB issued Tentative Cleanup and Abatement Order No. R9-2005-0126 for the Southwest Marine Site and NASSCO Site (the "Tentative Cleanup Order"). The Tentative Cleanup Order does not designate Port of San Diego as a person responsible for the contamination at either the Southwest Marine Site or the NASSCO Site. A Draft Technical Report of the CRWQCB issued in August 2007 states that the Board is not now naming Port of San Diego as a "discharger" in the Tentative Cleanup Order but may do so in the future if Port of San Diego's tenants do not comply with the Order after it is issued.

12. The CRWQCB has initiated administrative proceedings to determine whether it should adopt and issue the Tentative Cleanup Order. These administrative proceedings are ongoing and will culminate in an administrative hearing before the CRWQCB.

13. Upon information and belief, Port of San Diego has not been ordered by the CRWQCB to participate in the administrative proceedings relating to the Tentative Cleanup Order. Nonetheless, Port of San Diego has elected to participate in the proceedings voluntarily.

B. THE FIRST STATE POLICIES AND THE COVERAGE DISPUTE

14. First State issued two Special Public Entity Difference in Condition Comprehensive Liability Insurance policies to Port of San Diego for the policy periods May 1, 1980 to May 1, 1981 and May 1, 1981 to May 1, 1982, respectively. The First State DIC Policies, subject to their terms, conditions, limitations and exclusions, expressly provide gap coverage for claims not otherwise covered by Port of San Diego's comprehensive general liability insurance program. Copies of the First State DIC Policies are attached as Exhibit 1 hereto.

15. The First State DIC Policies provide for a potential defense obligation in the context of a "suit" for "damages." Specifically, the First State DIC Policies state in relevant part:

> II. Defense, Settlement, Supplementary Payments
>
> As respects such insurance as is afforded by this policy, the company shall:
>
> (a) defend in his name and behalf any *suit* against the insured claiming such damages . . .

(First State DIC Policies at Insuring Agreements, Section II [emphasis added].)

16. The First State DIC Policies contain a Provision ("Punitive Damage Provision") that provides in relevant part for defense of specific types of claims seeking punitive damages pursuant to the Exemplary Damages section (Article 3) of the California Civil Code:

> 2. Defense, Settlement, Supplementary Payments are amended to include
>
> (a) defend any claim against the named insured or its employees for damages under Section 3294 of the Civil Code or otherwise for the sake of example or by way of punishment, where such claim arose from an act or omission in the scope of employment.
>
> (First State DIC Policies at Endorsement, Special Provisions.)

17. The First State DIC Policies call for First State to indemnify the insured only for sums which the insured becomes liable to pay as "damages." The Policies state as follows:

> I. Coverage B – Property Damage Liability
> To pay on behalf of the insured all sums which the insured shall become obligated to pay be reason of liability, imposed by law, including Chapter 1681 of the State of California Statutes of 1963, or liability assumed by contract, insofar as the named insured may legally do so, for *damages* because of injury to or destruction of property, including the loss of use thereof.
>
> (First State DIC Policies at Endorsement, Special Provisions [emphasis added].)

18. The First State Policies provide that "[t]he insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of injury." (First State DIC Policies at Conditions, Paragraph 12.)

19. Port of San Diego has requested First State, pursuant to the First State DIC Policies, (i) to defend its interests in connection with the CRWQCB investigative orders and its voluntary participation in the administrative proceedings before the CRWQCB relating to the Southwest Marine Site and the NASSCO Site, and (ii) to indemnify it for any costs incurred in connection with any associated remediation or abatement.

20. First State believes that it owes no defense or indemnity obligations to Port of San Diego relating to any current or future CRWQCB investigations or administrative proceedings relating to the Southwest Marine Site and/or the NASSCO Site.

COUNT I

DECLARATORY JUDGMENT

No Obligation to Defend

21. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 20 above as though fully set forth herein.

22. Under the Defense, Settlement, Supplementary Payments provision set forth in Paragraph 15 above, First State's defense obligation is limited to "any suit against the insured."

23. Under controlling Supreme Court authority in Foster-Gardner, Inc. v. National Union Fire Insurance Company, 18 Cal.4th 875, 878 (1998), the CRWQCB investigations and proceedings do not constitute a "suit".

24. Inasmuch as Port of San Diego has participated in the CRWQCB administrative proceedings voluntarily and without having been joined in a "suit", First State has no obligation to defend Port of San Diego, and, pursuant to the Condition set forth in Paragraph 18 above, First State has no obligation to pay or reimburse any defense costs voluntarily incurred by Port of San Diego.

25. Under the Punitive Damage Provision set forth in Paragraph 16 above, First State is potentially obligated to defend only specific types of claims against the Port of San Diego or its employees seeking damages for the sake of example or for punitive damages arising out of an act or omission by an employee of the insured in the scope of his or her employment. The CRWQCB investigations and administrative proceedings do not involve any claim or request for punitive damages.

26. Accordingly, First State has no obligation to defend Port of San Diego under either the Defense, Settlement, Supplementary Payments provision or the Punitive Damage Provision of the First State DIC Policies or to pay or reimburse any defense costs incurred in connection with the CRWQCB investigations and proceedings.

COUNT II

DECLARATORY JUDGMENT

No Obligation To Indemnify

27. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 26 above as though fully set forth herein.

28. Under the Coverage B-Property Damage Liability provision set forth in Paragraph 17 above, First State's indemnity obligation is limited to sums which the insured "shall become obligated to pay . . . for *damages* because of injury to or destruction of property, including the loss of use thereof." (Emphasis supplied.)

29. Under controlling Supreme Court authority in Certain Underwriters at Lloyd's of London v. Supreme Court, 24 Cal.4th 945, 964 (2001), remediation expenses or cleanup costs which a party may incur or be ordered to pay in connection with CRWQCB proceedings do not constitute "damages."

30. The Punitive Damage Provision set forth in Paragraph 16 above contains no indemnity obligation.

31. Accordingly, First State has no obligation to indemnify Port of San Diego for any expenses or clean-up costs it might incur or be ordered to pay in connection with CRWQCB proceedings, because such expenses and costs do not constitute "damages" within the meaning of the Coverage B – Property Damage Liability provision and because the Punitive Damage Provision contains no indemnity obligation.

COUNT III

DECLARATORY JUDGMENT

No Obligation to Defend or Indemnify If There is Coverage Under CGL Policies

32. Plaintiff incorporates by reference the allegations of paragraphs 1 through 31 above as though fully set forth herein.

33. The First State DIC Policies afford coverage only for claims not covered by Port of San Diego's general liability insurance policies. Port of San Diego has not informed First State that its general liability insurance policies do not cover its claims relating to the Southwest Marine Site and/or the NASSCO Site.

34. Accordingly, First State has no duty to defend or indemnify Port of San Diego with respect to claims relating to the Southwest Marine Site and/or the NASSCO Site to the extent there is coverage for such claims under Port of San Diego's general liability insurance policies.

PRAYER FOR RELIEF

WHEREFORE, First State requests the entry of judgment as follows:

1. A declaration that First State has no obligation to provide Port of San Diego a defense in any current or future administrative proceedings before the CRWQCB, or investigations by the CRWQCB, involving the Southwest Marine Site and the NASSCO Site, or to pay defense costs in connection with the same.

2. A declaration that First State has no obligation to indemnify Port of San Diego Port of San Diego for expenses incurred in connection with any current or future administrative proceedings before the CRWQCB, or investigations by the CRWQCB, involving the Southwest Marine Site and the NASSCO Site, or for any associated clean up costs related thereto.

3. Such other relief as the Court deems appropriate.

Date: June 11, 2008

HOGAN & HARTSON L.L.P.

By: ______________________
David Singer

Attorneys for Plaintiff
FIRST STATE INSURANCE COMPANY

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

# 151895 - TC

June 12, 2008
12:13:35

Civ Fil Non-Pris
USAO #.: 08CV1046
Judge..: M. JAMES LORENZ
Amount.: $350.00 CK
Check#.: BC30724

Total-> $350.00

FROM: FIRST STATE INSURANCE CO.
VS.
SAN DIEGO UNIFIED PORT DIST.

ORIGINAL

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

FILED 08 JUN 12 PM 12:09
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

I. (a) PLAINTIFFS

First State Insurance Company

(b) County of Residence of First Listed Plaintiff Suffolk County, Massachusetts
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Hogan & Hartson, LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067
310-785-4768; David R. Singer

DEFENDANTS

San Diego Unified Port District

County of Residence of First Listed Defendant San Diego
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known) '08 CV 1046 L RBB

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☒ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☒ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☒ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence
- Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. Sec. 1332

Brief description of cause: Declaratory judgment action regarding insurance coverage.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ Declaratory Judgment

CHECK YES only if demanded in complaint: JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE June 11, 2008

SIGNATURE OF ATTORNEY OF RECORD [signature]

FOR OFFICE USE ONLY

RECEIPT # 151845 AMOUNT $350 APPLYING IFP JUDGE MAG. JUDGE

JAC 6/12/08